JUL 12 2001

Supreme Court, U.S.
FILED
JUL 12 2001
CLERK

No. 99-1823

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF COUNCIL FOR EMPLOYMENT LAW EQUITY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

MARK A. DE BERNARDO
COUNCIL FOR EMPLOYMENT LAW EQUITY
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

WALTER DELLINGER
SAMUEL ESTREICHER
(Counsel of Record)
ERIKA R. FRICK*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
* *Admitted in California and New York only*

Counsel for Amicus Curiae

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an employee's agreement to arbitrate employment-related disputes with an employer limits the scope of employee-specific remedies that the Equal Employment Opportunity Commission may recover on behalf of the employee through litigation under 42 U.S.C. §§ 2000e-5(f)(1) and (g)(1), 42 U.S.C. §§ 1981a(a)(1) and (d), and 9 U.S.C. §§ 1 et seq.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 2

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. TITLE VII AUTHORIZES THE COURTS – NOT THE EEOC – TO DETERMINE WHAT RELIEF IS APPROPRIATE IN A TITLE VII ACTION. 7

II. UNDER TITLE VII, THE APPROPRIATE RELIEF THAT A COURT MAY GRANT IS CIRCUMSCRIBED BY THE EMPLOYEE'S PRIOR WAIVER, SETTLEMENT, OR ADJUDICATION OF HIS RIGHTS. 10

III. ALLOWING EMPLOYEE-SPECIFIC REMEDIES IN AN EEOC ACTION ON BEHALF OF AN EMPLOYEE WHO HAS AGREED TO ARBITRATE HER CLAIMS WOULD CONTRAVENE THE FEDERAL ARBITRATION ACT AND IS INCONSISTENT WITH THIS COURT'S PRECEDENTS. 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 9, 11

Bercovitch v. Baldwin School, Inc., 133 F.3d 141 (1st Cir. 1998) 24

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 2

Circuit City Stores v. Adams, __U.S.__, 121 S. Ct. 1302 (2000) ..... *passim*

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998) 24

EEOC v. Astra USA, Inc., 94 F.3d 738 (1st Cir. 1996) 14

EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988) 23

EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) 13

EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987) 14

EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993) 13

EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

EEOC v. United States Steel Corp.,
921 F.2d 489 (3d Cir. 1990).....14

EEOC v. Waffle House,
193 F.3d 805 (4th Cir. 1999).....4, 13

Faragher v. City of Boca Raton,
524 U.S. 775 (1998).....2

Ford Motor Co. v. EEOC,
458 U.S. 219 (1982).....13, 17

General Telephone Co. v. EEOC,
446 U.S. 318 (1980).....15, 16

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991).....*passim*

Green Tree Fin. Corp. v. Randolph,
531 U.S. 79 (2000).....21, 23

Kremer v. Chemical Constr. Corp.,
456 U.S. 461 (1982).....11

McKennon v. Nashville Banner Pub. Co.,
513 U.S. 352 (1995).....11

Miller v. Public Storage Mgmt.,
121 F.3d 215 (5th Cir. 1997).....25

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985).....19, 21, 23

TABLE OF AUTHORITIES
(continued)

Page(s)

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983).....22

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977).....25

Oscar Mayer & Co. v. Evans,
441 U.S. 750, 755 (1979).....24

Rodriguez de Quijas v. Shearson/American Express,
490 U.S. 477 (1989).....21

Rogers v. General Electric Co.,
781 F.2d 452 (5th Cir. 1986).....13

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith,
170 F.3d 1 (1st Cir. 1999).....24

Seus v. John Nuveen & Co.,
146 F.3d 175 (3d Cir. 1998).....25

Truvillion v. King's Daughters Hospital,
614 F.2d 520 (5th Cir. 1980).....14

University of Tenn. v. Elliott,
478 U.S. 788 (1986).....12

STATUTES

9 U.S.C. §§ 1 et seq.....4, 22

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 1738 12

29 U.S.C. §§ 151 et seq. 9

42 U.S.C. § 1981a 6, 9

42 U.S.C. § 2000e-5 ..... *passim*

42 U.S.C. § 2000e-16 9

42 U.S.C. §§ 12101 et seq. 6

Pub. L. 102-166, 105 Stat. 1071 (1991) 24

OTHER AUTHORITIES

EEOC Policy Statement on Mandatory Arbitration, reprinted in Daily Lab. Rep. (BNA), No. 133, E-l ff. (July 11, 1997) 3

Eric A. Taussig, *Predispute Arbitration Agreements: The Philip Morris Program*, PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR (S. Estreicher ed., 1997) 3

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998) 19

Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Note, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885 (2000) 19

Robert Belton, *Harnessing Discretionary Justice in the Employment Discrimination Cases: The Moody and Franks Standards*, 44 OHIO ST. L. J. 571 (1983) 10

Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO STATE J. ON DISPUTE RESOL. 559 (2001) 3, 19, 20

Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1 (1998) 19

William L. Bedman, *Alternative Dispute Resolution: The Brown & Root Experience*, ch. 7 in PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR (S. Estreicher ed., 1997) 3

IN THE

Supreme Court of the United States

No. 99-1823

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF COUNCIL FOR EMPLOYMENT LAW EQUITY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the Council for Employment Law Equity as *amicus curiae* in support of respondent, with the written consent of the parties.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the COUNCIL FOR Employment Law Equity, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent are filed with this brief.

INTEREST OF AMICI

The Council for Employment Law Equity ("CELE") is a non-profit national coalition of major employers, based in Washington, D.C., which is committed to the highest standards of fair, effective, and appropriate employment practices, and to the promotion of such employment practices in the employer community; before the judicial, legislative, and executive branches of government; and to the public at large. The CELE represents a wide range of employers from all parts of the country and many sectors of the economy. The CELE routinely submits *amicus curiae* briefs to the U.S. Supreme Court and to other federal and state courts on employment issues of broad interest to the employer community at large. In addition, the CELE frequently submits comments to federal agencies during rule-making on proposed labor and employment regulations. The CELE also serves as a spokesperson for the employer community on major labor and employment issues.

CELE, its members, and the employer community generally are troubled by the position the Equal Employment Opportunity Commission has taken in this, and earlier, cases with respect to the general enforceability of pre-dispute arbitration agreements in the employment context. Desiring to provide a better internal system for resolving employment disputes – in keeping with this Court's essential approach to sexual and other harassment claims in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (noting "Congress' intention to promote conciliation rather than litigation in the Title VII context"), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) – a number of significant U.S. employers have entered into arbitration agreements with their employees that, we believe, do a better job of delivering accessible justice and a meaningful forum for workplace disputes than does a court-based litigation system. These agreements often provide for an internal grievance and

mediation process and, if the dispute cannot be resolved therein, send the dispute to binding arbitration before an arbitrator who is expressly empowered to award all statutory remedies for established violations. Some agreements also provide for a company-financed benefit plan that reimburses employee-claimants for their attorney's fees.[2]

The EEOC has determined that pre-dispute arbitration agreements, irrespective of how they are structured, violate the policy of the federal anti-discrimination laws, despite the contrary holding of this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *See* EEOC Policy Statement on Mandatory Arbitration, reprinted in Daily Lab. Rep. (BNA), No. 133, E-1 ff. (July 11, 1997). Given the Commission's view of *Gilmer* and of arbitration generally, the employer community reasonably fears that what the Commission is seeking in this case is the authority to enable employees and former employees to bypass, for all practical purposes, the arbitration agreements they have entered, by the device of suing in the agency's name. The effect of such a ruling will be to undermine the viability of arbitration agreements for employment disputes, effectively rendering a dead letter this Court's decisions in *Gilmer* and *Circuit City Stores v. Adams*, __U.S.__, 121 S. Ct. 1302 (2000).

---

[2] *See, e.g.*, William L. Bedman, *Alternative Dispute Resolution: The Brown & Root Experience*, PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR 123-35 (S. Estreicher ed., 1997); Eric A. Taussig, *Predispute Arbitration Agreements: The Philip Morris Program*, *id.* at 137-46. *See generally* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO STATE J. ON DISPUTE RESOL. 559 (2001).

INTRODUCTION AND SUMMARY OF ARGUMENT

The position of the Equal Employment Opportunity Commission ("EEOC" or "Commission") and its *amici* in this case is, for the most part, a red herring. They complain that the Fourth Circuit's decision allows an individual complaining employee to bargain away the EEOC's right to sue and its choice of forum. *See* Brief of the Petitioner ("EEOC Br.") 22, 23. Contrary to that characterization, the Fourth Circuit explicitly held that "arbitration agreements between charging parties and their employers [do] not infringe on the EEOC's statutory duty to enforce the antidiscrimination laws in court." *EEOC v. Waffle House*, 193 F.3d 805, 811-12 (4th Cir. 1999). Nothing in the court of appeals' ruling prevents the EEOC from "bring[ing] a civil action against any respondent," 42 U.S.C. § 2000e-5(f)(1); nothing prevents it from bringing such a suit on behalf of an individual employee who has signed an arbitration agreement; and nothing prevents it from bringing the action in a forum of its choice. The ruling below expressly acknowledges that the agency retains untrammeled authority to bring an action for injunctive relief. *See Waffle House*, 193 F.3d at 812. And the Fourth Circuit's holding in no way impacts the EEOC's ability in appropriate circumstances to challenge the validity of particular arbitration agreements under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq., or this Court's guidance in *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001).[3]

[3] Nor, of course, does the ruling of the court below prevent the agency from bringing an action for any legally authorized relief on behalf of individual employees who have not signed arbitration agreements enforceable under the FAA or cognate state law.

The only issue in this case is whether, when the EEOC brings a Section 706(f)(1) action on behalf of an employee (or former employee) who has signed a valid and enforceable arbitration agreement,[4] the agency may secure *individual-specific* relief for that employee as if he or she had never agreed to arbitration. Our position is that the agency may not secure such individual-specific relief because the scope of relief that the employee (or the EEOC on her behalf) may obtain is always a function of, and hence limited by, the employee's circumstances or actions. The employee's voluntary entry into an arbitration agreement is no exception. Numerous Title VII precedents make clear that the remedies that the EEOC may obtain on behalf of an employee may be limited by any number of unilateral actions that employee takes, such as her failure to mitigate her damages, her attainment of a comparable position with a different employer, or her waiver, settlement or adjudication of her claims. The EEOC offers no reason why the same principle should not apply to arbitration agreements. Just as the EEOC may not obtain back pay or front pay an employee who is ineligible for such relief because she failed to mitigate or she entered into a private settlement of her claims, the EEOC also cannot in a judicial forum obtain back pay, front pay, reinstatement, or other individual-specific remedies for an employee who is ineligible for such judicial relief due to her agreement to submit her claims to an arbitral forum.

The government, however, makes the quite remarkable argument that Title VII "grants the EEOC the right to obtain *all* statutory remedies in any action that it brings." EEOC Br. 18 (emphasis added). According to the EEOC, Title VII "in clear terms authorizes the EEOC to obtain *all* of the

[4] The EEOC agrees that the question of whether the arbitration agreement here is enforceable as between Eric Baker and Waffle House is not before this Court. *See* EEOC Br. 17 n.4.

listed forms of relief," *id.* at 19 (emphasis added), both those listed in Section 706(g) and in the 1991 amendments to the Civil Rights Act. *See id.* at 19, 17.

The provenance of the EEOC's reading of the statute is somewhat difficult to discern. There is no basis in Title VII for maintaining that the EEOC has the right "to obtain all statutory remedies in any action that it brings." When it sues under Section 706(f)(1), the agency may obtain *only* the relief that is legally authorized by the remedial provisions of Title VII – primarily Section 706(g) – which apply equally to claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. Under Section 706(g), in turn, it is the court that decides whether to "enjoin the respondent . . . , and order such affirmative action *as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief *as the court deems appropriate*." 42 U.S.C. § 2000e-5(g)(1) (emphasis added). When Congress amended Title VII and the ADA in 1991, it did not change Section 706(g)'s basic scheme, under which the court – not the EEOC – determines whether the sought-after relief is appropriate. The 1991 amendments simply state that a "complaining party" (defined to include the EEOC) "*may recover*" capped compensatory and punitive damages in addition to the remedies already authorized by Section 706. 42 U.S.C. § 1981a(a)(1)-(2) (emphasis added); *see id.* §§ 1981a(b)(1) & (d)(1)(B). The entitlement to relief of any kind depends on whether the relief in question is legally authorized under the circumstances of the particular case.

Thus, a straightforward reading of Title VII shows that although the EEOC has a statutory right to bring a civil action, the agency has no absolute statutory entitlement to obtain particular remedies. In the case of employee-specific remedies, the EEOC may only obtain those remedies that are deemed "appropriate" based on the employee's individual

circumstances and actions. In other words, under Title VII, the EEOC may choose to bring a civil action on behalf of any employee, but may obtain only that relief for which the employee is eligible. With regard to employee-specific remedies, the EEOC must take its employee as it finds him.

The government's interpretation of Title VII is also at odds with the Federal Arbitration Act ("FAA") and this Court's FAA jurisprudence. The FAA evinces a strong policy in favor of enforcing arbitration agreements. Refusing to hold employees to their agreement to arbitrate by allowing the EEOC to obtain employee-specific remedies on their behalf would, in effect, release an employee from his binding agreement to arbitrate, and would gravely undermine the purposes of the FAA. This Court has held that such an intent to override the FAA will only be found if Congress makes a clear statement to that effect in its legislation. However, in Title VII and the 1991 amendments, Congress did not provide that the purposes of the FAA should be subordinated to the purposes of the anti-discrimination statutes. Indeed, there is express provision to the contrary in the 1991 measure. Accordingly, when an employee has entered into a valid binding arbitration agreement with her employer, employee-specific remedies are not "appropriate" relief in an EEOC-initiated action on that employee's behalf.

ARGUMENT

I. TITLE VII AUTHORIZES THE COURTS – NOT THE EEOC – TO DETERMINE WHAT RELIEF IS APPROPRIATE IN A TITLE VII ACTION.

The government contends that Title VII "embodies a congressional policy that there can be a strong public interest in obtaining each of the forms of relief authorized by statute and a congressional delegation to the EEOC – not the courts – of the authority to decide when the public interest warrants bringing a public enforcement action to obtain that relief." EEOC Br. 29. *Amicus curiae* does not contest that

Section 706(f) gives the EEOC authority to bring an enforcement action on behalf of an employee – even if that employee is bound by an arbitration agreement – whenever the EEOC believes that such an action is warranted. However, we disagree strongly with the suggestion that the EEOC is authorized to determine what forms of relief are appropriate in a particular lawsuit. *See, e.g.*, EEOC Br. 19 (Title VII "in clear terms authorizes the EEOC to obtain *all* of the listed forms of relief") (emphasis added); *id.* at 19 (Congress appointed the EEOC with "*complete control*" over the relief that it is entitled to seek) (emphasis added); *id.* at 18 (Title VII "grants the EEOC the right to obtain *all* statutory remedies in any action that it brings") (emphasis added).

Like any litigant, the EEOC may in any judicial action *seek* a wide range of potential remedies, subject to the limitations of Rule 11 of the Federal Rules of Civil Procedure and futility. Under the remedial provisions of Title VII, however, Congress has unambiguously authorized the courts – not the EEOC – to determine which remedies constitute "appropriate" relief in an EEOC action against a private employer. Whereas Section 706(f), which defines the powers of the EEOC, clearly speaks of the EEOC's authority to bring a civil action when conciliation efforts fail, Section 706(g) – the basic remedial provision of Title VII – refers only to the power of the *courts*. Section 706(g)(1) states that, if the court finds intentional discrimination in such an action, "the *court* may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action *as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief *as the court deems appropriate*." 42 U.S.C.

§ 2000e-5(g)(1) (emphasis added).[5] Thus, notwithstanding the EEOC's suggestion that Congress appointed it with "complete control" over the relief that it is entitled to seek, the plain text of Title VII makes it quite clear that it is the courts – not the Commission – that must interpret the meaning of "appropriate" relief under Title VII, both in general terms and in any particular case. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-16 (1975) ("The [Title VII] scheme implicitly recognizes that there may be cases calling for one remedy but not another, and – owing to the structure of the federal judiciary – these choices are, of course, left in the first instance to the district courts [and then subjected to appellate review].").[6] Far from robbing the

[5] The 1991 amendments to the Civil Rights Act added new remedies to supplement those already available under Title VII, providing that a "complaining party" – including the EEOC – "*may* recover" compensatory and punitive damages in addition to the remedies already authorized by Section 706(g). *See* 42 U.S.C. § 1981a(b)(1) (emphasis added); *see also id.* §§ 1981a(a)(1)-(2), (d)(1)(B). But nothing in Section 1981A changes Section 706(g)'s baseline proposition that it is the court – not the EEOC – that is authorized to award relief as it "deems appropriate."

[6] By way of contrast, Section 717(b), which unlike the rest of Title VII contemplates an EEOC administrative adjudication where a federal agency is the respondent, specifically authorizes the EEOC to determine in the first instance what constitutes "appropriate" relief. *See* 42 U.S.C. § 2000e-16(b) ("[T]he [EEOC] shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section."). Congress clearly knew how to draft language granting first-level adjudicative remedial authority to the EEOC, yet chose not to under Section 706 or Section 1981A.

Title VII also differs sharply from the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 et seq., under which

EEOC of any statutory prerogative, then, the court of appeals in this case simply fulfilled its own statutory obligation to determine the appropriate relief given Baker's agreement to arbitrate his claims with Waffle House. As will be demonstrated *infra*, the court of appeals correctly held that, in an EEOC action brought on behalf of a particular employee in a judicial forum, granting employee-specific remedies does not constitute appropriate relief where the employee at issue validly waived his right to a judicial forum.

II. UNDER TITLE VII, THE APPROPRIATE RELIEF THAT A COURT MAY GRANT IS CIRCUMSCRIBED BY THE EMPLOYEE'S PRIOR WAIVER, SETTLEMENT, OR ADJUDICATION OF HIS RIGHTS.

The government contends that "Congress has expressly provided [in Title VII] that the EEOC may obtain all of the

---

Congress provided for exclusive agency enforcement and did not provide for a general private right of action. Congress quite deliberately rejected the NLRA model, under which an agency has investigatory *and* adjudicative powers, when it enacted Title VII in 1964:

> The enforcement mechanisms that Congress established for [Title VII] reflect the opinions of some members of Congress that the final determination of what constitutes unlawful employment practices and the relief from these practices should be made by the federal judiciary. . . . Congress was unwilling to remit the enforcement power to effectuate [Title VII] to the [NLRA-type] form of discretionary justice administered by a federal administrative agency.

Robert Belton, *Harnessing Discretionary Justice in the Employment Discrimination Cases: The Moody and Franks Standards*, 44 OHIO ST. L. J. 571, 581-82 (1983).

forms of relief authorized by statute in [federal court actions brought by the EEOC], including victim-specific relief such as back pay, reinstatement, and compensatory and punitive damages." EEOC Br. 11. As explained *supra*, and contrary to the EEOC's suggestion, the EEOC may – in any particular lawsuit – obtain only those remedies that the courts have deemed "appropriate" in that type of case.

It is true that Title VII and the 1991 amendments provide for a wide range of potential remedies, both broad-based and employee-specific. But the fact that Section 706(g) requires that a court determine what relief is "appropriate" suggests that some remedies contemplated by the statute may be inappropriate in a particular case or type of case. In order to determine whether a particular remedy is appropriate or inappropriate, a court must necessarily consider the particular circumstances of the employee on whose behalf the lawsuit has been filed.[7]

Certain remedies may be rendered inappropriate by the employee's own actions or circumstances. This principle is well-settled in the context of employee lawsuits under the anti-discrimination statutes. *See, e.g., McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995) (after-acquired evidence that employee has engaged in misconduct will affect reinstatement, front pay, and post-discovery back pay); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) (fact that employee has initiated proceeding in state court on his state law claim will bar any federal relief under 28 U.S.C. § 1738); *Univ. of Tenn. v. Elliott*, 478 U.S. 788

---

[7] For many of the Title VII employee-specific remedies – including back pay, reinstatement, and front pay – the "appropriateness" inquiry requires an equitable consideration of what relief would make the employee "whole," that is, return him to the position he would have been in absent the unlawful discrimination. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975).

(1986) (where employee has initiated state administrative adjudication, federal relief is barred under federal common law of preclusion). And *Circuit City* further established that, just as an employee may render himself ineligible for certain remedies through actions such as misconduct, failure to mitigate, or prior settlement or adjudication, the employee may also render himself ineligible for any judicial remedies by agreeing to arbitrate his claims. *See Circuit City*, 121 S. Ct. at 1306; *Gilmer*, 500 U.S. at 23. In this case, for example, it would be inappropriate for a court to grant Baker judicial remedies in a lawsuit brought on his own behalf.

This "appropriate[ness]" principle applies regardless of who brings the lawsuit – whether the EEOC or the individual employee. The EEOC objects that, in this case, it "has not agreed to arbitrate," and therefore it should not be bound by the employee's decision to do so. EEOC Br. 13; *see also* Brief of the AFL-CIO as *Amicus Curiae* in Support of Petitioner ("AFL-CIO Br.") 11-12. That argument ignores the critical difference between the action that the EEOC is entitled to bring under Section 706(f), on the one hand, and the relief that a court may grant under Section 706(g) and the 1991 amendments, on the other. The Fourth Circuit expressly held that the EEOC is not bound by the arbitration agreement and may still bring its own cause of action against Waffle House. It also correctly held, however, that the relief the EEOC may seek is limited by the employee's arbitration agreement. That holding is consistent with numerous Title VII cases in a variety of contexts. Under those precedents, the EEOC's *scope of recovery* is frequently limited by the unilateral voluntary actions of the employee on whose behalf the agency brings an action. The precise rationales of those cases differ, but they all stand for the fundamental proposition "that a charging party's actions that impede his own right to sue *can* also circumscribe the contours of the EEOC's suit in its own name to the extent that it acts on

behalf of the charging party." *Waffle House*, 193 F.3d at 813 (emphasis added).

Thus, for example:

- If the employee failed to mitigate her damages, the EEOC's ability to recover employee-specific remedies on her behalf is significantly limited. *See, e.g., Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (holding that where employee's rejection of reinstatement offer would limit employee's ability to recover back pay and front pay in a private action, EEOC is bound by the same limits).

- If the employee signed a release waiving all claims against his employer, the EEOC may not recover employee-specific relief on that employee's behalf. *See, e.g., EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987) (noting in dicta that "the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf"); *Rogers v. General Electric Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (noting the EEOC's concession that the plaintiff's waiver of her Title VII rights also precluded the EEOC from taking action).

- If the employee's claim was previously resolved through arbitration, the EEOC may not recover employee-specific remedies on the employee's behalf. *See, e.g., EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1011 (6th Cir. 1975) (complainant who received arbitration award based on his workplace discrimination claims "is not to recover any 'private benefit,' such as back pay," from the EEOC's action).

- If the employee settled his private lawsuit prior to the EEOC's action, the EEOC may not obtain employee-specific remedies on behalf of that employee. *See, e.g., EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 n.5 (1st Cir. 1996) (noting with approval that "the court below specifically held that settling employees had waived the right to recover damages in either their own lawsuits or in lawsuits brought by the EEOC on their behalf"); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (applying mootness doctrine to bar EEOC from seeking back pay when complainant had entered into binding settlement of her Title VII claims).

- If the employee lost on the merits in a prior private lawsuit, the EEOC may not obtain employee-specific remedies on his behalf. *See, e.g., EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (applying theories of privity and res judicata in holding that the dismissal of plaintiff's private action "bars recovery by the EEOC of backpay, liquidated damages, and reinstatement in his behalf"); *EEOC v. United States Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990) (because individuals should not be able to "relitigate the same claim through a representative any more than they could relitigate the same claim on their own behalf," complainants "who fully litigated their own claims under the ADEA are precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims"); *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 525 (5th Cir. 1980) ("[T]he EEOC may not bring a second suit based on the transactions that were the subject of a prior suit by a private plaintiff, unless the

EEOC seeks relief different from that sought by the individual.").

The above-cited cases demonstrate that even though the EEOC is not technically bound by the employer-employee arbitration contract, the EEOC is always bound by the particular circumstances of the employee on whose behalf it wishes to bring suit. Title VII, in other words, requires the EEOC to take its employee as it finds him.[8]

Contrary to the government's extensive reliance throughout its brief on *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980), the basic holding of that case – that the EEOC need not abide by Federal Rule of Civil Procedure 23 governing class actions when suing in its own right – has no application to this case. Moreover, *General Telephone* explicitly confirms the proposition that the EEOC may recover only "appropriate" relief under Title VII. *See id.* at 324-25 ("We do no more than follow a straightforward reading of the statute, which seems to us to authorize the EEOC to sue in its own name to enforce federal law by obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act."). Although

---

[8] The EEOC attempts in a footnote to distinguish the present litigation from cases involving "a prior private settlement or judgment" by baldly stating that the question in this case is "not one of res judicata or mootness, but rather whether Baker's mere choice of an arbitral forum for litigating his private claims is binding on the EEOC when it seeks victim-specific relief in a public enforcement action." EEOC Br. 41 n.13. The EEOC does not explain, however, why "Baker's mere choice of an arbitral forum" is different in any sense relevant here from any other employee choice to take action that compromises the viability of his claim (such as failing to mitigate damages, rejecting an offer of reinstatement, or entering into a settlement or release agreement). *Id.*

the government makes much of the Court's statement that the EEOC "'is not merely a proxy for the victims of discrimination,'" EEOC Br. 31 (quoting *General Telephone*, 446 U.S. at 326), we do not rely in this brief on the premise that the EEOC acts as a "representative" or "proxy" when it sues on behalf of an individual. Rather, under the statute, the EEOC – like a private litigant – may recover only that relief which is "appropriate" in light of the individual employee's circumstances. As even the EEOC acknowledges (EEOC Br. 41), *General Telephone* also held that courts "are not powerless to prevent undue hardship to the defendant and should perform accordingly," and thus that "[i]t . . . goes without saying that the courts can and should preclude double recovery by an individual." 446 U.S. at 333. Under that principle, an individual who has relinquished some of his rights may not regain those rights by way of an EEOC action on his behalf.

The opposite conclusion, advocated by the government, simply cannot be correct. Taken to its logical conclusion, the government's argument that it is authorized to "obtain all statutory remedies in any action that it brings," EEOC Br. 18, defies not only the statute, but also common sense. The scope of appropriate employee-specific relief necessarily depends on the particular employee's circumstances. For example, an order of reinstatement clearly would not be "appropriate" relief in a case where the employee at issue left his job voluntarily, or where the employee has obtained the same or better position elsewhere and does not want to return to his old job. Similarly, recovery of damages would not be appropriate where the employee has already recovered full or partial damages in a prior settlement.

The EEOC and *amici* are compelled to acknowledge that amounts obtained in prior, non-government-supervised settlements or arbitrations must be taken into account in determining the remedies the EEOC may recover on that

employee's behalf,[9] although they try to frame their concession in terms of a free-floating policy against double recovery. *See* EEOC Br. 40-41; *see* AFL-CIO Br. 18-19. In spite of the clear implications of that concession, the EEOC steadfastly maintains that it may obtain any remedy in any case. On the contrary, Congress clearly contemplated that – in determining what relief was appropriate in any given case – the courts would take account of the particular circumstances of the employee, and would adjust, limit, or eliminate employee-specific remedies accordingly.[10]

---

[9] Section 706(g)(1)(a) explicitly provides that an employee is ineligible for back pay if he fails to mitigate his damages. *See, e.g.*, *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 (1982) (Title VII claimant represented by EEOC "forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied"). Notably, the government and its *amici* admit that the basic principle behind the mitigation clause extends beyond its literal application in the back pay context to a general court-administered bar against employee windfalls or double recoveries of any kind. *See* AFL-CIO Br. 18-19 ("[A]ny amount previously received by an individual pursuant to a private settlement should undoubtedly be deducted from the back pay awarded to that individual in a suit brought by the EEOC."); EEOC Br. 40-41.

[10] The EEOC's proposed scheme of offsetting any money recovered by the EEOC on behalf of an individual by the amount received by such individual under a private settlement agreement fails to provide workable solutions to a number of prickly remedial problems. For example, if the EEOC were to recover a smaller amount in court than the individual received per the terms of the settlement agreement, it is unclear under the EEOC's theory whether the individual should have to return the difference to the employer or whether she should be permitted to keep the larger award. Even more important is the effect the EEOC's proposed scheme would have on the settlement of employment discrimination claims generally. Employers (like all litigants) settle discrimination claims to avoid the costs, time, and uncertainty associated with litigation. If employers are exposed to

The EEOC and its *amici* attempt to circumvent the text and structure of Title VII by falling back on a policy argument, *i.e.*, that barring the EEOC from obtaining employee-specific relief in a judicial forum on behalf of an employee who has agreed to arbitrate her claims contravenes the public purpose of Title VII. The EEOC asserts that its ability to recover employee-specific remedies is essential "to the public – not merely private – goals of the antidiscrimination statutes" because such remedies "serve[] both 'deterrence and * * * compensation objectives,'" EEOC Br. 33 (citation omitted) – a proposition which relies on the implicit assumption that arbitration will fail to accomplish the same objectives. The AFL-CIO adds that limiting the EEOC's recovery of such remedies through private arbitration agreements would "recreate the situation the 1972 amendments were intended to remedy, *i.e.*, one in which 'the EEOC presents largely an ineffectual threat.'" AFL-CIO Br. 10 (citation omitted).

Those arguments fail for several reasons. First, the import of the 1972 amendments to Title VII is mischaracterized. Prior to the amendments, the EEOC lacked any authority to initiate litigation of any kind, whether for injunctive or individual-specific relief. The agency thus presented an "ineffectual threat" because it relied entirely on moral suasion. The amendments to Title VII authorized the EEOC to sue for "appropriate" relief in its own cause of action.

---

the risk of having to defend claims for individualized relief brought by the EEOC, notwithstanding settlements they have reached with respect to those claims, employers will have little if any incentive to settle. Such a result not only would defy the judicial policy favoring private settlements, but it would also defy the congressional preference for private settlements embodied in the very statute at issue – Title VII. *See infra* discussion of Section 118 of the Civil Rights Act of 1991.

Second, even in cases where employee-specific remedies are not "appropriate," the EEOC is able to vindicate its role of acting in the public interest by seeking injunctive, including structural, relief. As the Fourth Circuit made quite clear in its opinion, the EEOC retains its full powers to pursue broad-based injunctive relief despite the fact that employee-specific remedies may be unavailable due to an arbitration agreement. Any employer who violated such an injunction could be held in contempt.

Third, both Congress and this Court have squarely rejected the premise of the EEOC and *amici*'s arguments, *i.e.*, that arbitration is an inferior means of enforcing statutory rights and resolving claims.[11] In the 1991

---

[11] Despite this Court's rulings to the contrary, the EEOC and *amici* stress that arbitration, however it is structured, does not effectively enforce Title VII and ADA rights. This contention flies in the face of studies, some by leading plaintiff advocates such as Lewis Maltby, that consistently find higher win rates for employees in arbitration than in court. *See, e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 45-55 (1998) (citing multiple studies, including the author's, for the proposition that employee-plaintiff win rates in arbitration are variously estimated at 51%, 63%, 68%, and 73%; employee-plaintiff win rates in employment litigation are variously estimated at 15%, 17%, 24%, and 28%). Indeed, it may be that arbitration's "simplicity, informality, and expedition," *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), serve to improve aggrieved employees' access to meaningful justice, both by dramatically expanding the pool of actual claimants and by providing rapid adjudication and relief. *See, e.g.*, Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 8 (1998); Estreicher, *supra* note 2; Note, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1894 (2000).

amendments to Title VII and the ADA, Congress made clear that arbitration was not only a suitable means for the resolution of statutory discrimination claims, but also a favored one. *See infra* discussion of Section 118 of the Civil Rights Act of 1991. Likewise, this Court in several cases has "recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).[12] Just like judicial

---

A number of the petitioner-side *amici* rely on early research by Lisa Bingham that purportedly establishes a "repeat player" advantage enjoyed by some employers in arbitration. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997). However, Bingham's study "did not control for some rather obvious variables that may explain positive employer outcomes, such as the size of an employer and the presence of a personnel department." Estreicher, *supra* note 2, at 567. Subsequent work based on broader data sets found a diminished "repeat player" effect and *no* statistically significant repeat arbitrator effect (*i.e.*, that an employer confronting the same arbitrator in a second case has a higher probability of success). *See id.* (citing unpublished study by Lisa B. Bingham & Simon Sarraf).

Moreover, the "repeat player" hypothesis is fundamentally flawed for its failure to take into account that employee-claimants are just as likely to have "repeat players" on their side in arbitration. The plaintiff bar in the employment arena has organized itself into a national information-sharing network, the National Employment Lawyers Association, which enables attorneys for employee-claimants to make intelligent selections of arbitrators and monitors arbiter performance.

[12] This Court has concomitantly rejected virtually all of the policy arguments that the government and its *amici* put forth in this case, including claims that "arbitration panels will be biased," that discovery in the arbitral forum will be inadequate, that arbitral forums do not issue written opinions, that judicial review of

resolution, arbitration may result in back pay, front pay, reinstatement, compensatory and punitive damages, and other remedies designed to deter and compensate, thus fulfilling the public purposes of Title VII. "[S]o long as the prospective litigant effectively may vindicate [her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637; *see also Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90 (2000) (citing cases). As a result, this Court "has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Circuit City*, 121 S. Ct. at 1313. In the ADEA context, for example, this Court noted that it is "unpersuaded by the argument that arbitration will undermine the role of the EEOC." *Gilmer*, 500 U.S. at 28. The EEOC here has raised no relevant distinction between the ADEA and Title VII or the ADA that would justify a different result in this case. In substance, the EEOC's brief merely attempts to relitigate the holdings of *Gilmer* and *Circuit City*.

Finally, Congress did not contemplate that back pay and other employee-specific remedies would be available in

---

arbitration decisions is too limited, that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions," and that "there often will be unequal bargaining power between employers and employees." *Gilmer*, 500 U.S. at 30-33. Such generalized attacks "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" and, as such, are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 481 (1989).

all cases; these remedies are not the equivalent of a civil penalty scheme. Instead, Title VII puts ordinary principles of mitigation and encouraging out-of-court settlement of claims above the purpose of imposing the maximum financial penalty on an employer.[13]

III. ALLOWING EMPLOYEE-SPECIFIC REMEDIES IN AN EEOC ACTION ON BEHALF OF AN EMPLOYEE WHO HAS AGREED TO ARBITRATE HER CLAIMS WOULD CONTRAVENE THE FEDERAL ARBITRATION ACT AND IS INCONSISTENT WITH THIS COURT'S PRECEDENTS.

Excluding employee-specific judicial remedies from the permissible scope of relief in a Title VII action filed on behalf of an employee who has bound herself to an arbitration agreement is required by "liberal federal policy favoring arbitration agreements" embodied in the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Gilmer*, 500 U.S. at 26 ("It is by now clear

---

[13] Thus, even if it were true that arbitration results in lower employee-specific awards in *comparable* cases than does judicial resolution (a proposition that has not been empirically verified), the EEOC's argument – that requiring the agency to take its employee as it finds her is inconsistent with Title VII's public purpose of deterring future discrimination – would be unpersuasive. In assessing the effectiveness of Title VII in terms of deterring discrimination, there is no principled distinction between, on the one hand, an EEOC action where an employee through a private settlement renders himself ineligible for any judicially ordered remedies, and, on the other hand, an EEOC action where the employee through signing an arbitration agreement renders himself ineligible for the same judicially ordered remedies. If one case does not subvert the statute, neither does the other.

that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."); *see also Circuit City*, 121 S. Ct. at 1313 (holding that FAA exception exempts contracts of employment of transportation workers – but not other employment contracts – from the FAA's coverage).

Under this Court's FAA jurisprudence, it is clear that there is a strong federal presumption of arbitrability. Under that presumption, parties to a pre-dispute agreement to arbitrate their future disputes in a final, binding manner have a federal right to enforce that agreement. The presumption applies even when the dispute involves statutory employment discrimination claims, as in *Gilmer*, and when the arbitration promise covering such claims is negotiated as a condition of obtaining employment, as in *Circuit City*. For over a decade and a half, this Court has stated and restated that this federal right to the benefit of the arbitration bargain can only be overridden by express language in – or an absolutely necessary implication from – another federal statute, thus indicating a congressional override of the baseline presumption of FAA enforceability.[14] This Court already has held in *Gilmer* that there is nothing in the ADEA that effects such an override of the FAA; and it has established that, in many respects, the ADEA and Title VII (and by extension, the ADA) are to be read "'virtually *in haec verba*,'" *EEOC v. Commercial Office Products Co.*,

---

[14] *See, e.g.*, *Gilmer*, 500 U.S. at 29 (override of FAA not found where Congress "did not explicitly preclude arbitration or other nonjudicial resolution of claims (under the ADEA), even in its recent amendments"); *Mitsubishi*, 473 U.S. at 628 ("[I]f Congress intended the substantive protection afforded [by the federal antitrust laws] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."); *see also Green Tree Fin. Corp.*, 531 U.S. at 89-90 (citing *Gilmer* and *Mitsubishi* with approval).

486 U.S. 107, 123 (1988) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979)). There is no reason to believe that Title VII should be read differently than the ADEA with respect to the enforceability of pre-dispute arbitration agreements.

One searches in vain for any language in Title VII or the ADA that might be read to accomplish such an override of the FAA's baseline presumption. Tellingly, neither the EEOC nor any of its amici point to such language. Indeed, the text of Title VII and the ADA, if anything, expresses a policy in support of arbitration, among other means of alternative dispute resolution. Thus, Section 118 of the Civil Rights Act of 1991 states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.*

Pub. L. 102-166, 105 Stat. 1071, 1081 (1991) (emphasis added).[15] Among "the Acts or provisions of federal law"

---

[15] To promote uniformity in this area in accordance with established principles of this Court's FAA jurisprudence, the Court may wish in this case expressly to reject the interpretation of the Ninth Circuit that this language in Section 118 can somehow be read as a Title VII override of the FAA presumption of enforceability of predispute arbitration agreements. *See Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). Notably, every other circuit that has passed on this issue has rejected *Duffield*'s reading, and has held that Title VII and ADA claims are arbitrable in the same way that ADEA claims are arbitrable after *Gilmer*. *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 11 (1st Cir. 1999); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 148-50 (1st Cir. 1998) (regarding ADA claims); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998); *Miller v. Public Storage Mgmt.*, 121 F.3d 215 (5th Cir. 1997).

amended by the 1991 legislation are Title VII, the ADEA, and the ADA.

And yet, if the EEOC is permitted to bring a suit for, and recover, employee-specific relief in a case where the employee signed an arbitration agreement, the arbitration agreement has in effect been reduced to a nullity. By the simple expedient of deciding to sue on the complaining party's behalf,[16] the EEOC can free the complaining party of the consequences of his prior arbitration agreement. Instead of a bargained-for single proceeding which both parties ex ante had preferred for the resolution of their future claims, there will now be two proceedings in two different forums seeking (insofar as individual-specific relief is concerned) precisely the same relief: one before the arbitrator, and one before a federal court in the EEOC-styled action. The inability to hold complaining parties to the benefit (and responsibilities) of the bargain, the duplication of proceedings, the inevitable race to judgment in the two forums, and the possibility of inconsistent relief – are certainly enough to discourage any willingness ex ante to agree to arbitration in the first place.

---

[16] An EEOC suit may not even be required. The EEOC's brief suggests that by simply withholding the issuance of a "right to sue" letter, the agency can stymie indefinitely the promised finality of arbitration. *See* EEOC Br. 21 n.6 ("Even after the 180-day period, a private suit may be commenced only if the charging party has received a right-to-sue letter from the EEOC.") (citing 42 U.S.C. § 2000e-5(f)(1)). As this Court held in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977), Section 706(f)(1) "imposes no [time] limitation upon the power of the EEOC to file suit in a federal court." *Id.* at 366.

The EEOC argues that "[t]he terms or policies of the FAA are fully vindicated by holding the private complainant (who agreed to arbitration) to his agreement, while permitting the EEOC (which has not agreed to arbitration) to pursue the full range of remedial options authorized by the antidiscrimination statutes." EEOC Br. 25. Contrary to this characterization, the government's position permits the employee to avoid her arbitration agreement and recover (through the EEOC) relief in a judicial forum that she previously waived in favor of arbitral remedies. The EEOC tries to avoid this obvious fact by arguing that the employee in that situation agrees "to forego that statutory right to intervene in a judicial action brought by the EEOC," *id.* at 27, but the EEOC's grant to the employee of any employee-specific damages awarded in the lawsuit is not dependent on the employee's right to intervene. Thus, in the EEOC's view, all that arbitration accomplishes – despite this Court's repeated insistence to the contrary in its FAA rulings culminating most recently in *Circuit City* – is the waiver of the employee's right to intervene in the EEOC-styled action. The agency's view is absurd on its face, and confirms the bankruptcy of the reading it urges on this Court.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

MARK A. DE BERNARDO
COUNCIL FOR EMPLOYMENT
LAW EQUITY
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

WALTER DELLINGER
SAMUEL ESTREICHER
(*Counsel of Record*)
ERIKA R. FRICK*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
* *Admitted in California and New York only*

Counsel for Amicus Curiae

July 12, 2001